No. 73-1090

In the Supreme Court of the United States

OCTOBER TERM, 1973

DAVID LAWRENCE NELSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,
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Petitioner contends that photographs used in a pretrial identification process were impermissibly suggestive, that the district court's evaluation of the photographs was improper because the court did not have before it the entire photographic spread, and that evidence of the pretrial identifications should have been excluded because the picture of petitioner included in the spread was taken during an unlawful arrest.

After being charged with two counts of disorderly conduct by making "offensively coarse gesture and display" on land acquired for federal use, in violation of 36 C.F.R. 2.7(b)(2),[1] petitioner was

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[1]Under 16 U.S.C. 3 the Secretary of the Interior is authorized to make "such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service * * *." The Section further provides that any violation

summoned to appear before the United States District Court for the Southern District of Mississippi. He waived trial by jury and consented to be tried by the United States Magistrate (R. 4).[2] Following his conviction, petitioner was sentenced to imprisonment for consecutive terms of six months on each count. The district court issued an order and opinion affirming the conviction (R. 318-321), and the court of appeals affirmed the judgment of the district court (Pet. App. A1).

The principal government witnesses were two women before whom petitioner indecently exposed himself on the Natchez Trace, a federal parkway in Mississippi. Mrs. Marguerite Brown, the victim involved in Count 2, testified that on March 17, 1972, she was driving alone on the Trace when a man—whom she identified as petitioner at trial (R. 121-122)—sped past her in a Blue Mustang "Mach I" and drove out of sight (R.112-113). Shortly thereafter, she saw the same car parked on the highway (R. 113) and its driver standing nearby, naked from the waist down and with his hand on his penis (R. 115-116, 143). Mrs. Brown observed him for several minutes, and at one point was only about six feet from him, before she managed to turn off and drive away (R. 114, 115, 118). About six weeks later Mrs.

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of such rules "shall be punished by a fine of not more than $500 or imprisonment for not exceeding six months or both * * *." The provisions of 36 C.F.R. 2.7 were promulgated pursuant to the authority conferred by, *inter alia*, 16 U.S.C. 3.

[2]"R." refers to the Appendix to the briefs in the court of appeals (containing, *inter alia*, the transcript of the trial), a copy of which has been lodged with this Court.

Brown was brought by the local sheriff to the paper mill where petitioner worked, and from a small viewing room she singled out petitioner from about a hundred employees as the man she had seen on the Trace, although she could not make the identification with certainty (R. 124-130).

Mrs. Jennie Cole, the victim involved in Count 1, testified to a similar incident that occurred on the Trace on November 14, 1972 (R. 33-41). From six feet away she "clearly" (R. 40) observed the offen-der-identified by her as petitioner at trial (R. 46)—stepping out naked from behind a white car and moving toward her with a "set expression on his face" (R. 35-37). Swerving away, she drove to Jackson, Mississippi, to report the incident (R. 38).

On December 20, 1972, after investigations by federal and state agents had pointed to petitioner as a likely suspect (R. 124-130, 178-179, 188-190), the local sheriff called petitioner by telephone and stated that "two cats from Natchez" (referring to two FBI agents) wanted to talk to him (R. 180). Petitioner arrived at the sheriff's office—"freely and voluntarily" (R. 181)—within about ten minutes, and went into an office with the two agents. After explaining that they were investigating incidents of indecent exposure on the Natchez Trace, the agents read aloud a waiver-of-rights form, which petitioner read and signed (R. 199, 217-219).Petitioner denied any involvement in the offenses (R. 219).

At the conclusion of the interview, one of the agents asked petitioner's permission to have his photograph taken for an "elimination spread" to identify the offender (R. 219). The agent reminded petitioner of his rights and told him that he did not have to be

photographed without his consent; petitioner replied that he wanted to cooperate fully "to clear this entire mess up" (R. 220-221). One of the interviewing agents testified that petitioner was not then under arrest and could have left the sheriff's office at any time he desired (R. 222).

In February 1973, Mrs. Cole was shown a photographic spread containing pictures of five men, including the picture of petitioner taken earlier by the FBI agents (R. 41-45). She identified the picture of petitioner "immediately" (R. 42; G. Ex. 1, R. 312314) and also recognized a photograph of his car (R. 45). A similar spread containing six photographs was shown to Mrs. Brown, who also identified petitioner's photograph as being that of the offender (R. 130-137; G. Ex. 2, 315-317).

1. Petitioner contends that his conviction, based in large part on eyewitness identifications at trial, should be set aside on the ground that the pretrial procedure for photographic identification was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" (*Simmons* v. *United States*, 390 U.S. 377, 384). Directing his attack at the snapshots shown to Mrs. Cole, the complaining witness in Count 1, petitioner argues that, though the offense occurred in Mississippi, "the photographic spread, with the exception of the defendant, indicates pictures of people who were in Texas" (Pet. 4).

Of the five persons whose photographs appear in that spread,[3] two have identification tags with Texas

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[3]The photographic spreads shown to the victims involved in each count are reproduced at R. 312-317.

markings above the numbers; another is wearing a tag with no state or county markings visible; and two men—petitioner and a uniformed soldier—are wearing no identification tags at all. The collection does not unfairly single out petitioner. Nothing in Mrs. Cole's testimony suggests that because the offense occurred in Mississippi she tended to eliminate pictures apparently taken in a nearby State. Indeed, she recognized the picture of petitioner without hesitation (R. 42). As the district court properly concluded, in agreement with the magistrate's findings (R. 72-73, 154-155), "[b]oth prosecuting witnesses unmistakably identified [petitioner] from photographs properly taken and properly authenticated, and likewise independently and unmistakenly identified [petitioner] as the culprit from the photographs and in person at the trial. There was literally nothing suggestive or impermissible in the identification of [petitioner] to even indicate any tinge of unfairness or suggestiveness as to his identity" (R. 319-320).

2. Petitioner also contends (Pet. 4) that the trial court could not properly evaluate the circumstances of pretrial photographic identification by the victim in Count 1,[4] since the court had before it only one of the two snapshots of petitioner used in the original spread. The record shows, however, that the photographs in Exhibit 1 (which contains one picture of petitioner, R. 313) were the complete set shown to Mrs. Cole. She testified that the agents had shown her

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[4]Petitioner asserts at one point that the entire spread involved in Count 2 was not before the court (Pet. 4). As his statement of the facts indicates *(ibid.)*, however, he apparently intends to refer to the pictures involved in Count 1.

"five photographs of various men" (R. 44) and later identified Exhibit 1 as those photographs (R. 47). The FBI agent who took petitioner's picture stated that the forwarded only one copy for inclusion in the spread shown to Mrs. Cole (R. 214-215). After a thorough discussion of this matter by both sides (R. 104-109), the Magistrate concluded that the agents had never exhibited any additional picture of petitioner (R. 109). [5]

In any event, there is nothing in the record to suggest that the inclusion of an extra snapshot in the spread exhibited to Mrs. Cole would have been impermissibly suggestive. Since there were two photographs of three of the five people pictured in Exhibit 1, a second snapshot of petitioner would not have singled him out. Moreover, as indicated above, it is clear that Mrs. Cole was influenced solely by the facial appearance of the people photographed; she selected petitioner's picture immediately, even before she saw all the photographs (R. 42, 56-57, 60, 70-71).

3. Relying on *Davis* v. *Mississippi,* 394 U.S. 721, petitioner argues finally (Pet. 5-6) that evidence of pretrial photographic identifications should have been

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[5]The confusion on this point seems to have arisen because Mrs. Cole had mentioned seeing a photograph of petitioner with a goatee, whereas no goatee appeared visible in the picture of petitioner before the court. As further discussion revealed (R. 109), the picture of petitioner in Exhibit 1 was a copy of that shown to Mrs. Cole and did in fact show petitioner with a goatee, although it is difficult to discern because of the grainy quality of the reproduction.

excluded as the product of an unlawful arrest. Contrary to petitioner's assertions, he was not under arrest or under any kind of coercion at the time he was photographed. Responding to the sheriff's telephone call, he freely went to that office; he signed a waiver-of-rights form and consented to be photographed, evidently having decided that the best tactic was to appear eager "to clear this entire mess up" (R. 220-221). He was never given the impression that he was being forcibly detained. The magistrate therefore properly rejected the claim that petitioner's picture was taken while he was unlawfully under arrest (R. 235-239).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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